1998

Autoliv ASP, INC. v. Workforce Appeals Board, Department of Workforce Services and Jon C. Edwards : Reply Brief

Utah Court of Appeals

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Randall G. Phillips; Attorneys for Respondent Jon C. Edwards; Suzan Pixton; Workforce Appeals Board; Attorney for Respondent Workforce Appeals Board.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

AUTOLIV ASP, INC., Petitioner, v. WORKFORCE APPEALS BOARD, DEPARTMENT OF WORKFORCE SERVICES and JON C. EDWARDS, Respondents.	Case No. 98-1640CA Priority 14 Oral Argument Requested

REPLY BRIEF OF THE PETITIONER

Appeal from a Decision Entered by the Workforce Appeals Board of the Department of Workforce Services

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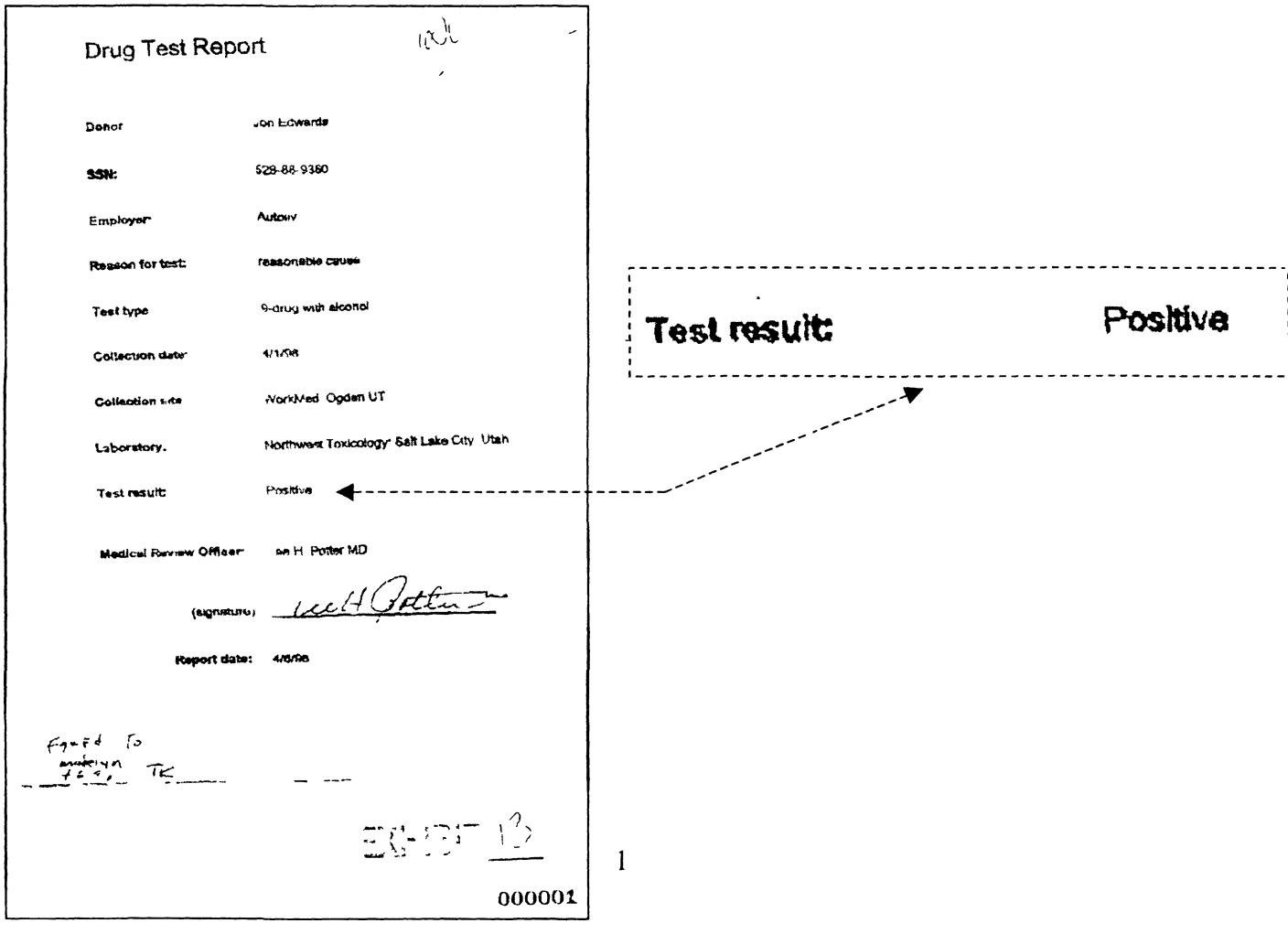
INTRODUCTION

The ultimate question in this case is whether unemployment benefits should be granted to a claimant who abused both cocaine and alcohol in a dangerous workplace. Claimant Jon Edwards ("Edwards") assembled air bag systems for automobiles—a far cry from hamburgers—using rivet guns and other dangerous machinery at Autoliv ASP, Inc.'s assembly plant.

Edwards was fired by Autoliv after he failed a test for both cocaine and alcohol. Edwards had a history of work-related substance abuse, and his failed test was taken after he had worked for several hours one morning after a night on the town. Edwards admits that he drank large quantities of alcohol that night, but he now denies any cocaine use during the last ten years. Edwards' drug and alcohol screen tells a different story.



Drug Test Report

Donor	Jon Edwards
SSN:	528-88-9360
Employer	Autoliv
Reason for test:	reasonable cause
Test type	9-drug with alcohol
Collection date	4/1/98
Collection site	WorkMed Ogden UT
Laboratory.	Northwest Toxicology Salt Lake City Utah
Test result:	Positive
Medical Review Officer	[illegible] H. Potter MD
(signature)	
Report date:	4/6/98

Figured To [illegible] TK

EXHIBIT 12

000001

Test result: Positive

This case arose after Edwards filed for unemployment benefits and prevailed in administrative hearing that was conducted during a strike at Autoliv's plant. At the hearing, Autoliv introduced the Drug Test Report, the document pictured on the previous page, which had been sent to the company by the testing laboratory. The Drug Test Report indicates that Edwards failed a screen for alcohol/drugs.

The document reproduced on the next page is at the heart of the case. It is the chain of custody report, which shows that Edwards' sample was handled properly. The report also establishes that, several hours into a shift, Edwards had cocaine in his system as well as a blood alcohol of .11%. Normally, this document would be dispositive of a claim for unemployment. Unfortunately, Autoliv did not manage to present this report at the unemployment hearing because of the labor strike.

There remains a preliminary question about whether Edwards was ever entitled to a hearing on his unemployment claim. The hearing had been scheduled after Edwards filed an untimely appeal of the initial decision of the Department of Workforce Services ("Department") to deny his initial application for benefits. This Court must decide whether good cause existed to excuse Edwards' untimely submission.

If this Court reaches beyond that issue, then this Court will have to decide if the chain of custody report was properly excluded from evidence. The Department refused to allow Autoliv to present evidence of Edwards' positive drug test, despite several requests to do so. Moreover, during the reconvened hearing, Edwards testified he had not used cocaine during the last 10 years. [R. 193:5-12] Edwards lied about his cocaine use,

BLOOD RECEIVED

NORTHWEST TOXICOLOGY INC.
1141 EAST 3900 SOUTH
SALT LAKE CITY, UTAH 84124
(801) 268-2431 · (800) 322-3361

CHAIN OF CUSTODY / REPORT FORM

NWTX-002 R.4A

SPECIMEN I.D. NO. 0225427

CLIENT NAME / ADDRESS / CODE MDR0101C

AUTOLIV ASP OGDEN & MODULE FAC
Attn: LORI MUIR
3350 AIRPORT RD MS A9613
OGDEN UT 84405
Phone: (801)-625-9494

EMPLOYEE / APPLICANT
JON Edwards

EMPLOYEE / APPLICANT I.D. NO.
528-88-9360

TYPE OF TEST (CHECK APPROPRIATE BOX)
☐ PRE-EMPLOYMENT ☐ RANDOM ☒ REASONABLE SUSPICION/CAUSE ☐ POST ACCIDENT
☐ RETURN TO DUTY ☐ FOLLOW UP ☐ OTHER (SPECIFY)

DRUGS SPECIMEN IS TO BE TESTED FOR
URINE

OTHER (SPECIFY) Blood alcohol

STEP 2

TO BE COMPLETED BY THE COLLECTOR WHO MUST READ SPECIMEN TEMPERATURE WITHIN FOUR MINUTES OF COLLECTION. CHECK THE BOX BELOW IF READING IS WITHIN THE SPECIFIED RANGE

☒ 90° - 100° F OR RECORD ACTUAL TEMPERATURE

REMARKS CONCERNING COLLECTION

STEP 3

COLLECTION SITE — NAME / ADDRESS / TELEPHONE

84401X01

WORKMED/OGDEN Loc:
1355 WEST 3400 SOUTH

OGDEN UT 84401
Phone: (8011-627-1273

STEP 4 CHAIN OF CUSTODY

DONOR STATEMENT

I CERTIFY I PROVIDED MY URINE SPECIMEN TO THE COLLECTOR, THAT THE SPECIMEN BOTTLE WAS SEALED WITH A TAMPER-PROOF SEAL IN MY PRESENCE AND THAT THE INFORMATION PROVIDED ON THIS FORM AND ON THE LABEL AFFIXED TO THE SPECIMEN BOTTLE IS CORRECT.

DONOR SIGNATURE

SPECIMEN COLLECTOR STATEMENT

I CERTIFY THAT THE SPECIMEN IDENTIFIED ON THIS FORM IS THE SPECIMEN PRESENTED TO ME BY THE DONOR, THAT IT BEARS THE SAME IDENTIFICATION NUMBER AS THAT SET FORTH ABOVE, AND THAT IT HAS BEEN COLLECTED, LABELED AND SEALED IN ACCORDANCE WITH APPLICABLE REQUIREMENTS.

R Vendola — COLLECTOR'S NAME (PRINT)
R Vendola — COLLECTOR'S SIGNATURE

DATE MO. DAY YR.	SPECIMEN RELEASED BY	SPECIMEN RECEIVED BY	PURPOSE OF CHANGE
4-1-98	DONOR - NO SIGNATURE	SIGN — PRINT R Vendola	PROVIDE SPECIMEN FOR TESTING
4-1-98	SIGN — PRINT R Vendola	SIGN — PRINT COURIER	Ship to lab
4 2 98	SIGN — PRINT COURIER	SIGN — PRINT DEANNA CARR	RECEIVING TO STORAGE
4 2 98	SIGN — PRINT DEANNA CARR	SIGN — PRINT TEMPORARY STORAGE	TEMPORARY STORAGE
	SIGN — PRINT	SIGN — PRINT	

FOR LABORATORY USE ONLY

SHIPPING NO. 704255545 13

ACCESS NT792072

SPECIMEN RECEIVED IN GOOD CONDITION? ☒ YES ☐ NO

SPECIMEN SEAL INTACT? ☒ YES ☐ NO

(TO BE COMPLETED BY THE LABORATORY)

The urine specimen identified above was screened by immunoassay for the following classes of drugs: Marijuana metabolites at 50 ng/ml; Amphetamines at 1000 ng/ml; Cocaine metabolite at 300 ng/ml; Opiates at 300 ng/ml; Phencyclidine at 25 ng/ml; Barbiturates at 300 ng/ml; Benzodiazepines at 300 ng/ml; Methadone at 300 ng/ml; Methaqualone at 300 ng/ml

Exhibit 1

COCAINE METABOLITES AS BENZOYLECGONINE AT OR ABOVE 150 ng/ml BY GC/MS

☐ NEGATIVE ☒ POSITIVE FOR THE FOLLOWING ,

☐ TEST NOT PERFORMED

TESTED FOR BLOOD ALCOHOL
☐ NEGATIVE
☒ POSITIVE 0.11 %

URINE ALCOHOL 0.14 % BY GC

DAVID J KUNTZ
(PRINT) CERTIFYING SCIENTIST'S NAME (LAST, FIRST, M.I.)

SIGNATURE OF CERTIFYING SCIENTIST

4/2/98

000045(a)

qualone at 300 ng/ml

COCAINE METABOLITES AS BENZOYLECGONINE
AT OR ABOVE 150 ng/ml BY GC/MS

☒ POSITIVE FOR THE FOLLOWING ,

TESTED FOR BLOOD ALCOHOL
☐ NEGATIVE
☒ POSITIVE 0.11 %

URINE ALCOHOL 0.14 % BY GC

but Autoliv was not permitted to use the positive drug test to impeach his credibility. [R. 193:14-32].

The Board improperly established and enforced higher procedural and evidentiary standards for Autoliv than for Edwards, as discussed in Autoliv's supplemental brief. Furthermore, the first ALJ's behavior at the initial hearing was improper and prejudicial, and the Board failed to make adequate findings to allow meaningful appellate review.

The Department defends its decisions by stating that the unemployment compensation system is meant to be liberally construed in favor of workers out of a job. This is undoubtedly true. The problem, however, is that the Department has allowed the system to subsidize a dishonest worker who abused drugs and endanged his co-workers. Edwards was terminated by Autoliv for just cause, and he should be denied the opportunity to abuse the system. This Court should reverse the Board's decision because Autoliv established with competent evidence that Edwards was terminated for just cause.

ARGUMENT

I. THE BOARD ERRED BECAUSE THERE WAS NO GOOD CAUSE FOR EDWARDS' UNTIMELY APPEAL.

A. This Court Should Apply a Standard of Review Based on Reasonableness.

In deciding whether Edwards established good cause for his untimely appeal of the Department's initial denial of unemployment, this Court should determine whether the Board's decision is reasonable. *Armstrong v. Dep't of Employment Sec.*, 834 P.2d 562, 565 (Utah Ct. App. 1992). "The ultimate decision as to whether good cause exists is a mixed question of law and fact and should be affirmed only if it is reasonable."[1] *Id.* (citing *Pro-Benefit Staffing v. Bd. of Review of the Indus. Comm'n*, 775 P.2d 439, 442 (Utah Ct. App. 1989)).

This Court should not accept the Department's contention that the Board's decision may be "reverse[d] only upon a plain abuse of discretion."[2] Appellee's Brief

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[1] It is notable that the Department failed to include this sentence within the large block quotation from *Armstrong* that appears in the Department's brief, particularly since this sentence is inconsistent with the standard of review advocated by the Department. The missing sentence should appear at the end of the first blocked paragraph. *See* Appellee's Brief at 20. In addition, the second paragraph in the Department's block quote comes from a footnote rather than from an uninterrupted part of the text. The Department's brief does not signal the omission of the key sentence with an elipses or indicate that the remainder of the block quotation comes from a footnote. *See Id.* at 20-21.

[2] The Department appears to argue that this "abuse of discretion" standard should apply to all the issues raised in this appeal. As explained herein and in Autoliv's opening brief, this standard applies to none of the issues. Instead, the Department's decision to grant Edwards benefits should be reviewed "with only moderate deference" because the proper application of the Employment Security Act and its relevant rules requires little highly-specialized or technical knowledge unique to the Department. *SOS Staffing Services, Inc. v. Workforce Appeals Bd.*, 983 P.2d 581, 583-84 (Utah Ct. App.
(Continued)

at 2. The Department incorrectly claims that "[a]ppellant [sic] courts in Utah have consistently held that the determinations of good cause for late filings from lower level administrative decisions should be left to the discretion of the agency." *Id.* at 18. Notably, the Department does not cite to either statutory or recent case authority in support of its proposition. Instead, the Department relies exclusively on *Salt Lake City Corp. v. Dep't of Employment Sec.*, 657 P.2d 1312 (Utah 1982) and *Pacheco v. Bd. of Review*, 717 P.2d 712 (Utah 1986), a pair of cases that predates the 1988 adoption of the Utah Administrative Procedures Act.

Although it remains true that appellate courts grant a degree of deference to administrative agencies when reviewing the application of law to a particular set of facts, the Department overreaches when it contends that its decision in this case can be reviewed only for "an abuse of discretion." Appellee's Brief at 2. Courts measure the degree of deference due to the agency by weighing factors including policy concerns and the agency's expertise. *Professional Staff Management v. Dep't of Employment Sec.*, 953 P.2d 76, 79 (Utah Ct. App. 1998).

In this case, "only moderate deference" should be given to the Department's decision concerning the award of unemployment benefits. *Id.* As this Court recently explained, "The proper application of the Employment Security Act and the relevant

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(Continued)

1999). Furthermore, the correction-of-error standard applies to those issues involving Autoliv's due process rights. *Questar Pipeline Co. v. Utah State Tax Comm'n*, 817 P.2d 316, 317-18 (Utah 1991); *Sierra Club v. Utah Solid & Hazardous Waste Control Bd.*, 964 P.2d 335, 347 (Utah Ct. App. 1998).

rules 'requires little highly specialized technical knowledge that would be uniquely within the Department's expertise.'" *Id.* (quoting *Allen v. Dep't of Employment Sec.*, 781 P.2d 888, 890 n.4 (Utah Ct. App. 1989)). Accordingly, this Court should review the Department's decision with only moderate deference, and the Department's decision to accept Edwards' untimely appeal should be affirmed only if the agency's decision was reasonable.

B. The Board's Decision to Grant Edwards Unemployment Benefits Should Be Reversed Because Edwards' Appeal Was Untimely.

This Court should reverse the Board's decision to grant Edwards unemployment benefits because the Board erroneously found good cause to excuse Edwards' untimely appeal. It is undisputed that Edwards' attorney filed the appeal beyond the statutory deadline, but the Board nevertheless accepted the appeal after Edwards' attorney testified that he believed that the filing deadline was not the deadline printed on the denial notice. [R. 32, 9:51, 52; 10:1-23]

The Employment Security Act provides that a claimant may appeal an initial denial of benefits by filing a notice of appeal "within ten days of the mailing or personal delivery of a notice of determination." UTAH CODE ANN. § 35A-4-508(2)(a). The initial denial becomes final unless "further appeal is initiated under the provisions of this section." UTAH CODE ANN. § 35A-4-508(1)(d). Because the statutory scheme also permits the Department to exercise continuous jurisdiction over unemployment claims, administrative regulations permit the late filing of an appeal in circumstances where

"good cause" can be established for the untimely submission. UTAH ADMIN. CODE R. 994-406-308 (Supp. 1997). The Utah Administrative Code states as follows:

> Good cause is limited to circumstances where it is shown that:
>
> (a) the appeal was filed within ten days of actual receipt of the decision . . .; or
> (b) the delay in filing the appeal was due to circumstances beyond the control of the appellant; or
> (c) the appellant delayed filing the appeal for circumstances which were compelling and reasonable.

Id.

In this case, the Board erroneously found that Edwards showed "compelling and reasonable" circumstances to justify his untimely appeal. The Board accepted the explanation of Edwards' attorney, Randall Phillips, that he had become confused about the deadline after the Board issued conflicting initial determinations on May 21, 1998 and May 22, 1998. Further, the Board found that it was reasonable that Mr. Phillips, an experienced attorney who had handled more than ten unemployment appeals during the preceding three years, had mistakenly concluded that he had 30 days to file Edwards' appeal. [R. 42; R. 32, 9:51-52, 10:1-23.] Because these explanations are neither compelling nor reasonable, this Court should reverse the Board's decision and deny unemployment benefits to Edwards.

C. The Department Was Not Responsible For Any Confusion That Could Justify Acceptance of Edwards' Late Appeal.

The Department should not be permitted to take the blame for confusion where there was reason for none. The Department argues that Edwards' late submission was justified because the Department "caused confusion" by issuing conflicting initial

determinations on May 21st and May 22nd.[3] Appellee's Brief at 15. The first notice granted Edwards benefits, whereas the second "corrected notice" denied them. *See* R. 12-13.

Although Edwards may have been puzzled by the Department's abrupt about-face, there was no reason to be confused about Edwards' appeal rights. The second notice stated as follows: "You must appeal in writing within 10 calendar days after this decision was mailed." [R. 14] The record shows that Edwards understood the need to take swift action after reading this notice. Edwards testified that he "[w]ent straight to [Randall Phillips, his attorney] . . . [t]he very next day [after receiving the May 22nd notice]." [R. 32, 7:36-40, 8:6-8] Thus, there is no evidence that the notice caused Edwards any confusion about the time for him to appeal.

The Department apparently wishes to accept partial blame for Edwards' untimely appeal in order to create a comparison to the circumstances in *Pacheco v. Bd. of Review*, 717 P.2d 712 (Utah 1986). In *Pacheco*, the claimant called a hearing officer at the Department and said that she could not submit her appeal before the deadline. Instead of emphasizing the finality of the ten-day deadline or offering a formal extension, the hearing officer instead urged Pacheco to "file as quickly as possible," thereby suggesting that the late appeal would be accepted by the Department. As a result, the court found

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[3] The Department also argues that "fairness would dictate that when the Department is at least in part responsible for creating the problem, a hearing be allowed." Appellee's Brief at 21. Autoliv does not contend that the initial hearing was improper; rather, Autoliv objects because, based on the testimony obtained at the hearing, the Administrative Law Judge should have concluded that there was no good cause excusing Edwards' untimely appeal.

good cause for Pacheco's late appeal because she had relied on the Department's representations. 717 P.2d at 714-716.

In contrast, the present case is distinguishable from *Pacheco* because neither Edwards nor his attorney delayed this appeal based on any representation from the Department. Indeed, neither Edwards nor his attorney contacted the Department at all. Moreover, all of the information provided to Edwards and his attorney by the Department was accurate and true. The May 22nd notice stated that Edwards' appeal needed to be filed within ten days. This statement is clear and unambiguous. There was no reason for confusion about this requirement, and thus no good cause justifying Edwards' untimely appeal.

D. The Erroneous Legal Reasoning of Edwards' Attorney Does Not Constitute Good Cause for the Late Filing.

The Department cannot defend its flawed decision by inviting undeserved blame for the error of Edwards' attorney. Attorney Phillips filed the appeal at least five days too late supposedly because he concluded—incorrectly—that the Utah Administrative Procedures Act ("UAPA") set the deadline for appeal. [R. 36] The Utah Administrative Procedures Act plainly states, however, that the Act "does not govern . . . the initial determination of any person's eligibility for unemployment benefits." UTAH CODE ANN. § 63-46b-1(2)(i) (emphasis added). In light of the plain language of both this UAPA provision and the May 22nd notice, it was unreasonable for an attorney of Phillips' experience to disregard the notice's ten-day deadline in favor of a limitations period

defined by an unrelated statute. The Board thus erred in finding good cause for the late filing of Edwards' appeal.

The Department also maintains that good cause was established for the late appeal because "claimant's attorney believed some kind of appeal had occurred making UCA 63-46b-3(1)(vi) applicable with its 30 day time limit for filing an appeal." Appellee's Brief at 17. Although the Department has never developed this argument or explained its rationale, apparently the Department contends that Mr. Phillips believed that the May 22nd notice was an appellate decision rather than an initial determination of benefits. This strained interpretation of events cannot be reconciled with the terms of the May 22nd notice, which direct the claimant to appeal to the agency within ten days rather than to the court of appeals within thirty days.

Moreover, Phillips' conduct cannot be squared with the explanation of his conduct now advanced by the Department. If Phillips believed that the May 22nd decision announced a final appellate decision at the administrative level, then Edwards would have had 30 days in which to file an appeal with the Utah Court of Appeals. Yet Phillips ultimately filed the appeal with the agency rather than the court of appeals. On the other hand, if Phillips thought that the notice meant what it said—that he had ten days to appeal an initial denial of benefits to the agency—then it was unreasonable for Phillips to allow the ten days to expire in reliance on an unrelated UAPA provision.

In summary, the late submission of Edwards' appeal by his attorney cannot be blamed on the Department or excused by his attorney's reliance on the Utah Administrative Procedures Act. Moreover, it was unreasonable of the Board to accept

any of these explanations after Phillips acknowledged that he had been aware of the ten-day deadline. Phillips testified as follows:

> Q: Well, did you understand that there was a time limitation as far as filing an appeal?
> A: Yes, I did, your honor. The—*From what I understand is that from ruling that within ten days you need to file the appeal . . .*

[R. 32, 9:51-52, 10:1-2 (emphasis added)]

The Board thus erred when it ignored this testimony and concluded that good cause had been shown for the untimely appeal. It was unreasonable for the Board to conclude that "compelling and reasonable" circumstances justified the acceptance of the tardy appeal in light of Phillips' testimony that he was aware of the deadline, the clear directions on the May 22nd notice to appeal to the agency within ten days, and the express terms of the Utah Administrative Procedures Act. This Court should therefore reverse the Board and dismiss Edwards' claim for unemployment benefits.

E. This Court Should Follow *Armstrong* and Avoid the Creation of a Double Standard for Attorneys.

Not surprisingly, the Department's brief barely addressed *Armstrong v. Dep't of Employment Sec.*, 834 P.2d 562 (Utah Ct. App. 1992), a case in which this Court rejected as untimely an appeal filed only one day late by a *pro se* claimant who claimed confusion between "working days" and "calendar days." Given this Court's unwillingness to extend the filing deadline even a single day for an unrepresented worker who believed he had ten "working days" rather than ten "calendar days" to appeal, this Court cannot affirm the Board's decision to give shelter to an experienced lawyer who filed an appeal at least five days too late. Edwards' attorney had handled more than ten unemployment

appeals during the preceding three years, and he was aware of the ten-day deadline. [R. 42; R. 32, 9:37-38]. His professed confusion about the deadline arose after he reviewed a statute that stated its inapplicability to this appeal. Moreover, he made no effort to resolve his alleged confusion with a simple phone call to the Department.

This Court cannot affirm the Board's decision without either overturning *Armstrong* or creating a double standard for attorneys. The law should not be more lenient of lawyers, nor should it be more forgiving of lawyers than *pro se* litigants. The decision of the Board is not reasonable and should be reversed. Edwards' claim for unemployment benefits should be dismissed.

II. AUTOLIV DID NOT INTENTIONALLY WITHHOLD EVIDENCE FROM THE ORIGINAL HEARING.

This Court should not be misled by the Department's nonsensical allegation that Autoliv purposely withheld the chain of custody report. It defies reason that Autoliv would intentionally withhold a document that conclusively establishes Edwards' positive test for both cocaine and a high level of alcohol (.11 %). Autoliv's inability to produce this document at the original hearing resulted not from purposeful intent but rather from a combination of bad luck, good intentions gone awry, and the chaos of the GM strike.

The Department incorrectly assumes that Autoliv had a chain of custody report in its possession at the time of the hearing. This assumption is both inaccurate and unsupported by the record.[4] The drug and alcohol screen was performed by Northwest

[4] In its statement of facts, the Department alleges that "Dr. Potter retained the 'Chain of Custody/Report Form' and sent a copy to the employer." Appellee's Brief at 5. The (Continued)

Toxicology Labs, which sent a copy of the basic "Drug Test Report" to Autoliv. *See* R. 1. Notably, this was the only document from the drug screen that came into Autoliv's possession before the hearing, and the company entered it into evidence. *Id.* Autoliv did not obtain the chain of custody report until later, and then the company promptly delivered it to the Department.

The Department misinterprets and twists a number of comments in an effort to support its fantastic conclusion that "Autoliv was allowed to present its evidence and chose not to." Appellee's Brief at 27. The Department then suggests that "[a]ny argument to the contrary is a misstatement of the facts." *Id.* This statement proves ironic given the Department's own surprising lack of fidelity to the record. Consider the allegation that followed this bromide:

> [Autoliv] even had its evidence available at the time of the hearing through the testimony of Dr. Potter. When Dr. Potter admitted he was in possession of the test results, Ms. Stice could have asked him to fax it to the Department.

Id. The second sentence in this passage deserves scrutiny, especially since its latter half is nothing more than rank speculation. The opening clause—"[w]hen Dr. Potter admitted he was in possession of the test results"—is at best a speculative inference based on a

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(Continued)

Department's citations to the record do not support its account, however. There is no evidence that the chain of custody report was sent to Autoliv before the hearing. Dr. Potter testified only that he sent a "report" of the positive result to Autoliv. [R. 32: 21-23] The "report" to which Dr. Potter referred was the simple "Drug Test Report," not the chain of custody report. *See* R. 1.

suggestive statement; at worst, the clause is a fabrication contradicted by Dr. Potter's testimony:

> PHILLIPS: And you indicated [that] you don't have the chain of custody [report].
> POTTER: Not with me. Not—Not right here. I did review the chain of custody yes when I did the report and submitted it, but I don't have that with me right now.
> PHILLIPS: I have nothing further.
> JUDGE: Dr. Potter, do you know who would retain the—the drug testing results and information of that nature?
> POTTER: We would have it here, but I don't, like I say, I don't have that right with me right now.

[R. 32: 27: 3-15 (emphasis added)] This testimony establishes—contrary to the Department's contention—that the chain of custody test report was not in Dr. Potter's personal possession when he testified. Although his statement that "[w]e would have it here" invites speculation that Dr. Potter might have been able to search for the chain of custody report, it is sheer conjecture for the Department to suggest that Dr. Potter could have located the report and faxed it to the ALJ during the original hearing. It is also noteworthy that the ALJ did not ask Potter whether he could send a copy of the report. Perhaps most importantly, Dr. Potter never indicated any unwillingness to share the positive test report; rather, he repeatedly stated that he didn't have the report at his fingertips.

The Department is misguided in its contention that Autoliv "decided not to release" a document proving that Edwards tested positive for cocaine and a blood alcohol of .11%. Appellee's Brief at 6. The Department contends that Autoliv "made a calculated decision, in conjunction with its attorney, to withhold evidence at the evidentiary hearing." *Id.* at 22. The only evidence the Department cites to support this

conclusion is the e-mail sent by Autoliv's in-house counsel nine days before the hearing. This message was sent to one of Autoliv's human resource specialists, and copies were also forwarded to the ALJ, several other Autoliv employees, and Valerie Stice, who represented Autoliv at the original hearing. Because the Department assigns such great import to selected passages of this missive, its entire text is reprinted below:

> I understand the Brigham facility will be shut down this week for the 4th of July and the GM strike. In any event, as soon as you return, please fax the chain of custody form for J. Edwards' drug/alcohol test to Valerie @ Gibbons ASAP @ fax 801-261-0110.
>
> I believe we discussed the issue last week during which we agreed to release the form without showing the actual readings or the substance involved. The main objective in releasing the form will be to establish propriety in handling the sample and to show that no tampering occurred. The form has several copies, to which the employer has a right to retain one copy showing the name, etc.
>
> For Valerie:
>
> Please explain @ the hearing that the chain of custody form will be available for the ALJ upon return from the shutdown caused by the strike.
>
> Please call me if you have any questions @ 29598 or 625-9598
>
> Thanks.

See Addendum H to Appellee's Brief.

This message, when read in whole and in the context of the GM strike, cannot reasonably support the radical conclusion drawn by the Department. The first and last paragraphs confirm that the chain of custody report was unavailable because of the GM strike and the holiday. In addition, the final note—the attorney's request that Stice let the ALJ know that the test results would be available after the nationwide strike ended—also corroborates the company's intention to turn Edwards' positive alcohol and cocaine tests over to the Department at its earliest opportunity.

The Department focused its gaze on the second paragraph alone. There Autoliv's counsel advised that the company had made a preliminary decision not to release the test's readings. It seemed unnecessary, since the positive cocaine result justified Edwards' termination by itself. But the Department now reads this paragraph as evidence that Autoliv intended to withhold vital evidence: "It is presumed that the bottom portion of the Chain of Custody/Report Form was to be masked in such a way as not to show the test results." Appellee's Brief at 7. This purported "fact" is a presumption—and it is simply wrong. The message's plain language showed that the company was considering withholding the numerical *readings*, not the *results*.[5] Besides, if the company had actually insisted on concealing the readings, then the company would have eventually submitted a redacted report for the hearing. Instead, the company provided the entire document to the Department, as promised, as soon as it became available.

The Department's conspiracy theory cannot be reconciled with Autoliv's conduct. For example, if the company had actually wanted to conceal evidence from the Department, it makes little sense that Autoliv's in-house counsel would notify the ALJ

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[5] The Department also argues that Autoliv could not prevail without submitting the readings. *See* Appellee's Brief at 25-26. To the contrary, Autoliv could—and did—establish just cause for Edwards' termination even without the readings. After all, a positive cocaine test constituted grounds for termination under the company's zero-tolerance policy. [R. 124]. Furthermore, because Edwards had a history of work-related alcohol abuse—he had been placed on probation after he had been arrested and charged with driving a company-rented vehicle while under the influence of alcohol--Edwards testified that he was aware that he could be terminated if he tested positive for drugs or alcohol. [R. 189:46-49] This testimony by itself satisfies the knowledge and culpability prongs, and the control prong has been met because Edwards was in control of his consumption of cocaine and large quantities of alcohol.

nine days before the hearing about the company's difficulties obtaining the report. [R. 31] Nor does it make sense, given the Department's view, that Autoliv's representative at the hearing repeatedly pled for permission to leave the record open so that the company could submit the chain of custody report. [R. 32: 21:21-31, 29:14-16]

Indeed, the most compelling fact that undermines the Department's theory is this: upon conclusion of the GM strike, Autoliv obtained the chain of custody report and immediately submitted it to the Board. There is no logical reason why Autoliv would have intentionally delayed the delivery of this document. After all, the chain of custody report establishes conclusively the Edwards consumed both cocaine and a large quantity of alcohol before beginning his shift as a rivet gunner.

III. THIS CASE IS EASILY DISTINGUISHED FROM *GRACE DRILLING.*

This Court should not be misled by the Department's efforts to analogize this case to *Grace Drilling v. Bd. of Review*, 776 P.2d 63 (Utah Ct. App. 1989). Although there are some similarities between *Grace Drilling* and this case, the Department is overreaching when it argues that the facts in *Grace Drilling* are "so compellingly similar to the facts in this case as to be controlling." Appellee's Brief at 22. To the contrary, there are significant differences between the two cases. Moreover, these differences demand and dictate different results.

For example, Grace Drilling was *unwilling* to provide the drug test report when so requested, whereas Autoliv was *unable* to present the chain of custody report at the hearing. Furthermore, unlike the employer in *Grace Drilling*, Autoliv made reasonable efforts to obtain the chain of custody report before the hearing. Autoliv also advised the

ALJ nine days before the hearing about the difficulties it was encountering in its effort to secure the report.

Autoliv's willingness to present evidence of Edwards' substance abuse also distinguishes this case from *Grace Drilling*. In that case, "the written test results were not offered into evidence, and Grace Drilling failed to call any witness who had administered the test or who was otherwise familiar with the testing procedures." *Grace Drilling*, 776 P.2d at 65. In contrast, Autoliv introduced the Drug Test Report and called several witnesses, including Dr. Potter, who had filled out the Drug Test Report, with personal knowledge relating to Edwards' drug test. *See* R. 1.

Nevertheless, given Autoliv's diligence, it is puzzling that the Board refused to leave the record open, especially since the ALJ in *Grace Drilling* practically begged the employer in that case to submit the test results. As the court of appeals explained:

> At the conclusion of the hearing, the appeal referee requested further information, including a copy of the test results which Grace Drilling agreed to provide. *The record was left open for this purpose. However, Grace Drilling later advised the appeal referee that it would not provide the test report.* Accordingly, the appeal referee affirmed the Department of Employment Security's initial disposition awarding [the claimant] benefits based on the available evidence in the record.

Grace Drilling, 776 P.2d at 65 (emphasis added).

In this case, Autoliv sought only what Grace Drilling was offered (and then surprisingly wasted): permission to submit documentation of the claimant's positive drug test after the initial hearing. Autoliv repeatedly asked the ALJ to leave the record open so it could obtain and submit the chain of custody report. Autoliv made its first request even before the hearing opened, and the hearing transcript is peppered with the company's

requests for this accommodation. [R. 31; R. 32: 21:21-31, 29:14-16] Yet Autoliv's request was summarily denied.

The ALJ's refusal to leave the record open for Edwards' positive drug test markedly distinguishes this case from *Grace Drilling*. Because of the ALJ's decision, Autoliv never had the chance to submit the chain of custody report. In contrast, as the court of appeals observed, "Grace Drilling was given two opportunities to present the results and lay the appropriate foundation for receiving them into evidence." *Id.* at 70.

The present case is also distinguishable from *Grace Drilling* because there was a second hearing. This difference matters because Autoliv was denied the right to use the chain of custody report at the reconvened hearing. When Edwards testified under oath that he had not used cocaine for a decade, Autoliv requested and was denied permission to impeach Edwards' dishonest testimony with the chain of custody report. The Board's decision tainted the proceedings and deprived Autoliv of due process. The Board's decision improperly elevated its procedural concerns over the truth-finding process. Although the Board rationalized that it would be unfair to allow Autoliv to "relitigate" the case by admitting the drug test, the truth was sacrificed. Public policy demands that this Court reach a different result.

This case deserves an outcome based on the unique set of facts presented. This case is not comparable to *Grace Drilling* because (1) Autoliv introduced some evidence at the hearing about the claimant's drug test; (2) Autoliv notified the hearing officer in advance when it encountered trouble securing the chain of custody report; (3) Grace Drilling was *unwilling* to provide the drug test report when so requested, whereas Autoliv

was *unable* to present the chain of custody report at the hearing; (4) the hearing officer in *Grace Drilling* agreed to leave the record open to receive the drug test, but the ALJ in this case refused the same request; (5) unlike the employer in *Grace Drilling*, Autoliv was always willing to submit documentation of the drug test to the agency; and (6) this case involved a second proceeding at which Autoliv was denied the opportunity to confront a witness with evidence that was in the company's possession. Given these significant distinctions, the Department's comparison to *Grace Drilling* fails. This case should be decided on its own merits, and Edwards' application for unemployment benefits should be dismissed.

IV. THE DEPARTMENT VIRTUALLY CONCEDED THAT AUTOLIV WAS DENIED A FAIR HEARING.

The Department made almost no effort to refute Autoliv's contentions that (1) the Board improperly established and enforced higher procedural and evidentiary standards for Autoliv than for Edwards; (2) the Board and the second ALJ erred by refusing to allow Autoliv to impeach Edwards' testimony with his positive drug test result; and (3) the first ALJ's behavior at the primary hearing was improper and prejudicial. These issues are vitally important, and the Board did nothing more than offer cursory denials, if the arguments were addressed at all. Faced with such silence in the face of compelling facts, this Court should reverse the Board's decision and remand because Autoliv was not afforded a fair hearing.

V. AUTOLIV ESTABLISHED JUST CAUSE FOR EDWARDS' TERMINATION WITH COMPETENT EVIDENCE.

This Court should reverse the Board because Autoliv established with competent evidence that Edwards was terminated for just cause. Under Utah law, an employer bears the burden of showing: (1) the employee's knowledge of expected conduct; (2) that the offending conduct was within the employee's power and capacity to control; and (3) culpability. See UTAH ADMIN. CODE R. 994-405-202 (Supp. 1997).

The Department did not contest the fact that an employer may establish a just cause termination for drug use without showing that the employer complied with any testing policy. The Utah Administrative Code provides that "*[i]n addition* to the drug and alcohol testing provisions above, a prima facie case of ineligibility for benefits under the Employment Security Act may be established through the introduction of *other competent evidence*." UTAH ADMIN. CODE R. 994-405-208(6)(f) (Supp. 1997) (emphasis added).

This Court should reverse the Board's decision because, even without the positive chain of custody test result, Autoliv presented enough competent evidence to establish just cause for Edwards' termination. Autoliv proved that: (1) Edwards had knowledge that Autoliv expected him to abstain from both alcohol and illegal drugs; (2) Edwards had the capacity to control his consumption of alcohol and illegal drugs; and (3) Edwards engaged in culpable conduct based on Autoliv's expectations.

Furthermore, the Board compounded its error by apparently excluding dispositive evidence: namely, Edwards' confession to one of Autoliv's human resource officers that he had used cocaine, a statement that was corroborated by the chain of custody test result

that was proffered but not accepted into evidence by the Board. Because confessions are admissions by party-opponents, Edwards' statement is not hearsay, and it supports a finding of just cause for Edwards' termination.

CONCLUSION

This Court should dismiss Edwards' application for unemployment compensation. In the alternative, this Court should remand this action to the Department of Workforce Services for further proceedings.

DATED this 15th day of March, 2000.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF THE PETITIONER was mailed, postage prepaid, on this 15th day of March, 2000 to the following:

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